

MINUTES & NOTICE OF BOARD ACTION

APPROVED May 8, 1996



LANE COUNTY BOARD OF COMMISSIONERS

This document, upon approval in a public meeting by the Board of County Commissioners, serves as official minutes of such meetings as required under the Open Meetings Law, ORS 192.650.

Pursuant to notice made by mailing agendas to news media, a selected list of jurisdictions and individuals in Lane County, a meeting of the Board of County Commissioners was held.

Questions should be directed to The Board Office Specialist 3, ext. 4203.

January 10, 1996
9:00 a.m.

REGULAR MEETING
BOARD OF COUNTY COMMISSIONERS

Harris Hall
Main Floor

Chair Bobby Green, Sr. presided with Steve Cornacchia, Ellie Dumdi, Jerry Rust, and Cindy Weeldreyer present. Sharon Giles, Recording Secretary.

1. **ADJUSTMENTS TO THE AGENDA**

None.

2. **PUBLIC COMMENTS**

None.

3. **COMMISSIONERS' ANNOUNCEMENTS**

To be held at approximately 10:40 a.m.

4. **EXECUTIVE SESSION as per ORS 192.660**

To be held this afternoon.

5. **COUNTY ADMINISTRATION**

a. Announcements

Bill Van Vactor, County Administrator, and the Board, offered expressions of condolence to Teresa Wilson, County Counsel, whose husband passed away last night.

b. DISCUSSION/Process to Fill HR&MS Director Position.

Van Vactor discussed the memorandums contained in the agenda packet. Noting that this position is extremely diverse, he asked for input from the Board regarding what to look for during the recruitment. Van Vactor remarked that he feels overall management skills are critical in this department. The Board concurred with Van Vactor's assessment and agreed with the process as outlined. Green suggested that a high emphasis be put on a customer-driven attitude.

6. COMMISSIONERS' BUSINESS

a. ORDER 96-1-10-1/In the Matter of Appointing Representatives to Various Committees and Agencies.

Green asked if there were any changes in the appointments as outlined in the Board Order. There was agreement that any reference to the Youth Campus Task Force and the Blue Ribbon Task Force could be deleted as they are no longer functioning groups. Weeldreyer noted that she is an alternate on the Lane Economic Committee. With regard to the LCOG Senior Advisory Council, Weeldreyer indicated that she cannot attend due to Board meeting conflicts, but stated that she has appointed a senior to represent her on the committee.

MOTION: Approval of the Order, as amended. Rust MOVED, Dumdi SECONDED.
VOTE: 5-0.

b. ORDER 96-1-10-2/In the Matter of An Election Authorizing a Three-Year Split Rate Serial Levy for Lane County Sheriff's Operations.

Weeldreyer expressed concern that there is no reference to what the County will do with the money that is left on the table, remarking that it is a key and critical point in having the voters understand why the County is asking for more money. Van Vactor agreed, but observed that whatever is placed in the ballot title legally commits those funds and that due to dependence on external revenue sources, there may be a situation where other revenues are reduced and money may need to be reallocated. Rust remarked that the County will be in a position to have next year's budget pretty well set by the time of the vote, so the public will be able to see what the allocation of expenditures will look like. He indicated that while he had hoped for a title which included the word "savings," this is the best shot legally. Cornacchia emphasized the need to also talk about the Sheriff and District Attorney concerns regarding changing the budget deficit plan from an 8-year term to a 6-year term, which would increase available resources in the interim. Cornacchia stated that he has told the District Attorney that he does not wish to have the Board take up that issue, but would like to

schedule a Leadership Team meeting, including the lay Budget Committee members and possibly the three councilors, in a week to 10 days to give the District Attorney an opportunity to present his position. Cornacchia stressed that it is important in the campaign that it be very clear what the \$10 million represents, i.e. that it is really only \$2.5 million of disposable resource after addressing a status quo budget. Rust stated that he thinks the vote will come down to whether people are willing to go for \$100 more in taxes in the cities to get a higher level of public safety and if rural people are willing to pay \$200 more for public safety. McManus remarked that this exercise has been very collaborative and has set the course for future government interaction.

MOTION: Approval of the Order. Rust **MOVED**, Dumdi **SECONDED**. VOTE: 5-0, with reservations expressed by Weeldreyer. There was consensus to schedule a Leadership/Budget Committee meeting in 7 to 10 days, with a courtesy invitation to other city councilors who were involved.

7. PUBLIC WORKS

- a. ORDER 96-1-10-3/In the Matter of Constructing Improvements on Centennial Boulevard From I-5 to Prescott Lane and Aspen Street From Centennial Boulevard to Centennial Boulevard Elementary School, Including Assessments and Setting a Lien Against Adjacent Properties.

Don Maddox, Real Property Manager, briefly reviewed this item (see material on file). Responding to Cornacchia, he stated that no letters of remonstrance have been received and that there have been 11 phone calls and 2 letters regarding deferral of assessments.

MOTION: Approval of the Order. Rust **MOVED**, Dumdi **SECONDED**. Cornacchia indicated he is supportive of the project, but retains reservations regarding the policies of assessment on collectors and arterials. Weeldreyer concurred. VOTE: 3-2, Cornacchia and Weeldreyer dissenting.

Green asked Weeldreyer and Cornacchia if they think the issue of assessments should go to the Policy and Procedures Committee. Cornacchia replied that he believes the majority of the Board feels strongly in support of the assessment policy and that he is not requesting another attempt to convince them. Dumdi indicated that the Board has not had a policy discussion and that she would welcome one. Green expressed support for the current assessment process. Rust suggested that the Roads Advisory Committee might be the appropriate body to initially process this and inform the Board of their thoughts. Van Vactor noted that Weeldreyer, Cornacchia and Dumdi seem interested in further discussion. It was determined that the discussion would begin at the Roads Advisory Committee level; and after receiving their input, maybe further coordination could take place with the Finance and Audit Committee. Rust

observed that one of the considerations needs to be the ramifications/implications for the Road Fund if these costs are not paid for in the present manner. Cornacchia noted the upcoming planning process for the Road Fund, suggesting that this could be incorporated at that time. Cornacchia asked that Roads Advisory segregate out Urban Growth Boundary feeder roads in subdivisions. Weeldreyer remarked that this conversation will have an impact on Ayers Road.

- b. DISCUSSION/Review of a Motion for Reconsideration by the Board of Commissioners' Decisions on November 8, 1995 (Board Order 95-11-8-2, Board Order No. 95-11-8-3) Remanding to the Hearings Official for Supplemental De Novo Hearings, a Request to Allow a Dwelling Within an Impacted Forest Land Zone District (F2/RCP) on Parcels Identified as Tax Lot 802 and Tax Lot 800 of Assessor's Map 19-04-05 (PA 4374-92, PA 4375-92, Norman Fogelstrom).

Bill Sage reviewed the history of this matter, including a January 5 Appellant document, Response to Motion to Dismiss and Response to Motion for Reconsideration and a January 9 memorandum from Applicant's agent. (see material on file). He remarked that staff is recommending that the Board review and decide on both Motions. Sage indicated that all parties are in the audience and are prepared to argue today if the Board desires. He commented that the Hearings Official is scheduled for January 18, so this would be an appropriate time; but he added that scheduling could occur on January 24, which would require giving some direction to the Hearings Official.

Stephen Vorhes, Assistant County Counsel, remarked that the Board has a great deal of discretion and reviewed the options and ramifications. He indicated that one option is to hear argument on whether or not to grant the Motions and, if interested in hearing responses to ex parte contacts, that could also be done today. Responding to Rust, Sage stated that staff is recommending granting a review on the ex parte issue. Cornacchia observed that the Motion for Reconsideration is for the Board to reconsider the merits of the appeal. He stated that the other exercise is to give the applicant the opportunity to discuss the substance of the ex parte contacts. With regard to the Motion to Reconsider, Cornacchia indicated that he is troubled by an after-the-fact attempt to get the merits on the appeal into the record when the applicant's counsel had the opportunity to do that in a timely manner. He added that the reason for the appeal was because of the inclusion of the opponent into the process. Cornacchia stated that it is especially troubling because issues, including land sale contracts and the concept of after acquired title, were brought up. With regard to whether or not the opponent should have the opportunity to hear more information on the ex parte contacts, Cornacchia recalled that disclosure of the memo was made and the opponent knows the content of the ex parte contact. He explained that the other ex parte contact was the one he disclosed which was a phone call to Farthing for explanation/clarification regarding the lot lines on the maps and not the

merits of the case. Cornacchia summarized that everything was disclosed and he is not sure he sees the value in having hearing/arguments regarding whether to reconsider.

Rust commented that this is a good case on why ex parte contacts should be avoided even though they aren't prohibited. He stated that he thinks that it would be fair to let the parties speak, question the Board and bring out arguments. Weeldreyer remarked that she would rely on the advice/recommendation of county counsel and staff to give 10 minutes to each party today. Vorhes commented that he had been pointing out some of the risks, and that the Board could simply ask each party to argue both issues and then entertain motions. MOTION: To allow both parties 10 minutes each for arguments on ex parte contacts. Rust MOVED, Dumdi SECONDED. Responding to Cornacchia, Rust indicated that the topic could be wide open and that he was most interested in procedural rights. After a brief discussion, there was agreement to amend the Motion to add "as to whether or not it should be reconsidered." VOTE: 5-0.

Wendie Kellington, Preston, Gates and Ellis, stated that she represents Heru Tarjoto. She indicated that she was greatly concerned regarding making the ultimate decision maker defensive or angry. Kellington explained that their concern is that she has never seen a hearings officer attempt to apply the doctrine of "after acquired title" and that she believes that is for courts to do. She added that she has never seen a lot line adjustment when there is one lot that becomes two, as she thinks that is a partition. Kellington explained that they hadn't seen the need for additional paperwork. She stressed that it was unsettling to hear the scope of the Board's concerns about the decision and to learn that perhaps some of the concerns were the product of a discussion with the attorney for the applicant. Kellington noted that it is not a secret that this is a contentious matter and the fact that a member of the Board talked with one side or the other causes concern. She remarked that she has looked at the video tape and it seems that there was a sense of confusion about the facts. Kellington also explained that the video tape indicates that the Board member in question then talked with other Board members after the ex parte contact and, in effect, had the ears of all of the commissioners. She added that the Board member had then indicated he would take the lead on November 8th.

With regard to ex parte, Kellington stated that she believes the applicant's representative is mistaken about the scope of the law. She clarified that the statute requires that LUBA will remand a county decision if it is based on ex parte contacts unless the requirements of another statute governing ex parte contacts are followed. Kellington remarked that that statute goes on to say that it applies to any action, not just a final decision, of a planning commission or county governing body. With regard to the November 8 proceeding, she indicated that no opportunity to speak was identified or provided and staff had advised that there would be no opportunity to speak, so they had assumed that any decision or action that would be made would be

based on the record to date. Kellington stated that there are appellate decisions that say that ex parte contact issues are not procedural errors, but that they are "errors of substance;" and unless requirements are followed, it will result in reversal or remand of a land use decision. At this point, Kellington asked for an additional period of time to speak as her ten minutes was nearly up.

Cornacchia expressed concern that the discussion was going into the merits of the case and indicated he could not support allowance of additional time. Rust stated that he found most of the discussion to be valuable, observing that it was based on procedures and ex parte law. He noted that this is the party that says they've been prejudiced and compromised, and he suggested that it was not unusual to allow additional time and that the same amount of time could be added to the other party's presentation. Green granted an additional three minutes specifically for Kellington to speak to her conclusions around the ex parte contact and the merits of that. Kellington asked whether this was the opportunity to ask clarifying questions about the nature and extent of the ex parte contacts, or whether this was going to be done after hearing from both parties. Rust suggested that Kellington make her concluding remarks and then put her questions on the record. Vorhes cautioned that it may be that those questions elicit the need for answers, thus the opportunity to respond will be included in time of questioning. Kellington referred to the November 7 memo, observing that there is "new stuff" in there, even though it is an unsupported assertion. She remarked that there is no evidence in the record regarding countywide significance. Kellington stressed that the first time after acquired titled was mentioned was in the applicant's responsive memorandum to the Hearings Officer's decision and the Hearing's Officer responded to it in his denial of reconsideration. Kellington remarked that this is relevant to the ex parte contact issue as it probably would not have occurred but for the ex parte contact.

Cornacchia expressed concern that Kellington had given the impression that it's wrong to have ex parte contacts and hadn't mentioned things that have to be done to show that there is no error. Kellington explained that the rule regarding ex parte contacts has two pieces, i.e. the constitutional piece and the statutory piece; and that if a decision-maker or decision-making body is incapable of making a decision based on the evidence and arguments presented, and if that is derived from ex parte contact, there is no amount of "fessing up" that will cleanse that ex parte contact. She added that if there is a straight ex parte contact, it results in an automatic reversal or remand of the ultimate decision that is reached, unless the party who was not a party to that contact has an opportunity to explore and understand the nature of that contact and respond to it.

Farthing was allowed 13 minutes. Farthing stated that he represents Norm Fogelstrom, the applicant. He noted that on November 8, the Board had remanded Fogelstrom's appeals back to the Hearings Official and did not decide the outcome of

the permits. Farthing stressed that the Board had acted in accordance with Lane Code. He remarked that the other party had, until one day prior to that date, the right to request the opportunity to participate in that determination and any subsequent hearings and did not avail themselves of that opportunity. Farthing stressed that they shouldn't even be here pursuant to Chapter 14 of Lane Code. With regard to the ex parte contacts, Farthing explained that they only come up in the context of final land use decisions made by Board, which was not the situation in this case. He urged the Board not to get caught up in this ex parte discussion, and noted that at the time in question, disclosure of ex parte was gratuitous on Vorhes' part. Farthing questioned why Kellington did not ask Cornacchia any questions during her 13 minute opportunity. Responding to Rust, Farthing indicated that the full blown de novo hearing on January 18 will cure everything.

Weeldreyer asked Vorhes if by not taking any action right now, Kellington will still have the opportunity to present any concerns to the Hearings Official. Vorhes confirmed. Weeldreyer indicated that she is comfortable not taking a position and allowing the process to move forward. Rust indicated he was unclear, with regard to the motion for reconsideration, about what action is being asked for. Vorhes stated the motion is for the Board to reconsider its November 8 decision, with one option being to hear at a later time. He stated that the Board has wanted to hear what effects disclosure would have on that decision. Vorhes continued that the motion to reconsider is at the Board's discretion. He indicated that having heard this discussion, the Board may want to consider some sort of action, with one possibility to be to refer all of this back to the Hearings Official for inclusion in documents of this proceeding.

Kellington asked for the opportunity to ask questions, with Green commenting that he thought it was clear that questions should have been asked during the additional three minutes. He indicated that could be submitted to the Hearings Official, but that he would not allow additional time at this time. Rust concurred, pointing out that Kellington had been instructed to make wrap up remarks and then get on the record with any questions and Cornacchia could then have answered questions on the "County's time." He expressed concern that the problem now is that because Kellington's time was not used adequately, the explanation of the ex parte contact is still not known.

Cornacchia recalled that he had informed the Board at the November 8 meeting that he had called Farthing regarding which argument goes with which property and that he had needed clarification regarding which property held the land sale contract issues and which one had the lot line issues. Cornacchia stressed that he and Farthing did not talk about the merits of either issue, but rather talked about where the arguments fit physically on the ground. He stated that as a land use lawyer, he is familiar with the term "after acquired title" and that he brought it into the conversation and did take the lead to identify issues as he had the knowledge from prior practice. Cornacchia

pointed out that it was the Hearings Official who raised the extraneous issues and that he advocated in the remand that the Hearings Official get evidence on how Lane County has dealt with lot line adjustment/land sale contracts and then render his decision based on his evidence. Cornacchia stressed that his main concern was having the Hearings Official raising issues and deciding the case on matters that were not raised by the parties.

Cornacchia summarized that he has given the entire content of the ex parte contact and had explained to Board members the day before that he had had that contact and would clarify the maps the next day. He emphasized that he has disclosed the contact three times now, noting that he usually "goes overboard" in his ex parte contacts.

Rust remarked that this case is strictly one of process and has nothing to do with disbelief. He observed that when there is an item on the agenda that says land use hearing/appeal, the Board is in a quasi-judicial setting and that triggers ex parte, whether or not it is a final decision. Rust stressed that that is "at least the custom and tradition and I hope, and I think, the law." He added that if one of the parties is compromised in procedural rights, ultimately they can lose their substantive rights. Rust remarked that the fact is that Cornacchia had extensive discussions with one attorney, so the other attorney is requesting a chance to go back to the beginning. He indicated that the Board had followed Cornacchia's lead and the arguments he advanced, based on the information Cornacchia developed from Mr. Farthing; and maybe things would have been handled differently if the Board had had the other attorney's view. Rust concluded that he thinks the Board has a duty to provide a level playing field.

Kellington offered her objection, for the record, that she had not had an opportunity to ask any clarifying questions about the nature and extent of Cornacchia's contacts. Green clarified his position, noting that Kellington had had ten minutes to make her point and was also granted an additional three minutes; thus if she had wanted to ask questions, it seems she would have done so during that time. Cornacchia objected to Kellington's comment that she was not provided the opportunity. Kellington stated that she believes the process is wrong.

Weeldreyer commented that the remand to the Hearings Official for supplemental de novo hearings allows the opportunity for new information and asked for clarification as to why the Board has to take action before that.

Dumdi observed that Cornacchia's ex parte was for information gathering, stating that she doesn't think the Board acted improperly.

Green asked for Vorhes' recommendation about whether to offer further opportunity to Kellington for questioning. Vorhes indicated that the "opportunity to explore" is

not required, as the statute requires only the opportunity to respond.

It was noted that this item is already with the Hearings Official and lacking a motion to the contrary, it will remain there. Responding to Weeldreyer, Vorhes stated that the entire record of this proceeding, including the video tape, the audio tape, transcripts, etc., could be presented to the hearings official by either attorney or planning staff and made part of the record.

This meeting recessed at 11:10 to reconvene at 11:15.

8. CONSENT CALENDAR

- A. Approval of Minutes: July 26, 1995, Regular Meeting, 1:30 p.m.
 October 17, 1995, Work Session, 9:00 a.m.
 October 17, 1995, Work Session, 1:30 p.m.
 October 18, 1995, Regular Meeting, following HACSA
 October 18, 1995, Regular Meeting, 1:30 p.m.
 December 11, 1995, Public Hearing, 1:30 p.m.
 December 11, 1995, Public Hearing, 7:00 p.m.
- B. Human Resources and Management Services
- 1) ORDER 96-1-10-4/In the Matter of Ratifying the Addendum to the AFSCME 2831 Labor Agreement Between Lane County, the District Attorney, and the American Federation of State, County and Municipal Employees, Local 2831 as Recommended by the County's Bargaining Representatives.
 - 2) ORDER 96-1-10-6/In the Matter of Accepting an Offer and Selling Excess County Owned Real Property - a Portion of Tax Lot 18-10-02-13-5300 (E. Mapleton Road).
 - 3) ORDER 96-1-10-7/In the Matter of Accepting an Offer From O.D.O.T. to Purchase Surplus County Owned Real Property (Between Beltline and Bertelsen), (Portion of Former Danebo Landfill).

Dumdi asked that Item 8.C.1. be pulled for consideration.

MOTION: Approval of the balance of the Consent Calendar. Rust **MOVED**, Weeldreyer **SECONDED**. VOTE: 5-0.

C. Public Works

- 1) **RESOLUTION AND ORDER 96-1-10-5/In the Matter of Acquiring Fee or Other Interests in Portions of Certain Real Properties for the Improvement of Munsel Lake Road.**

Dumdi expressed concern that the current design for this road will heavily impact a number of properties. She stated that there are concerns and that she has not been able to pull a meeting together yet to get more information. Dumdi observed that Lane County is facing a road fund shortfall and, perhaps the Board may want take a longer, harder look at this project. She requested that this item be taken off today's agenda and postponed for 30 days.

There was consensus to postpone this item for a report back in 30 days. Cornacchia asked what the postponement will do to the project contracting/acquisition, etc. Maddox noted that this project is scheduled to go to bid in June for construction during this season. He indicated that there is the probability that this project will be lost for this season if there is a delay.

9. **HUMAN RESOURCES AND MANAGEMENT SERVICES**

- a. **ORDER 96-1-10-8/In the Matter of Creating the Classification and Salary Range for Waste Management Technical Specialist and Adding 1.0 FTE to the Budget of the Waste Management Division.**

Cheryl McCawley, Personnel Analyst, reviewed the agenda memorandum (see material on file). She indicated that negotiations with the bargaining unit have been completed.

Responding to Cornacchia, McCawley stated that the entry level for the person anticipated to fill this position would be at the top step, explaining that this is a voluntary demotion. Rust commented that he would like to defer action, partially because of the upcoming Solid Waste Executive Group report. Craig Starr remarked that staff is trying to deal with two concerns, both revenue shortfall and management concerns. He indicated that he thinks there is a need to take this action if the Board wants to change the way the organization has been functioning, adding that postponement will make that more difficult. Starr expressed concern that this will continue the uncertainty and will delay improvement of the organization. Rust asked if there is a work plan for this position and if there is really a bonafide public need for this position.

Weeldreyer stated that the direction from SWEG is to look at operational efficiencies

before reducing services. She indicated that she is uncomfortable until she knows how this new position fits into operational efficiencies. Weeldreyer suggested a delay of one week until a subcommittee of SWEG looks this over. She stated that there could be a report on how this fits in at next week's meeting.

There was consensus to defer action on this item for one week, with Starr to report back on a work plan for this position at that time.

10. EMERGENCY BUSINESS

None.

There being no further business, this meeting adjourned at 11:59 a.m.



Sharon Giles
Sharon Giles
Board Secretary